

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 3, 2009 Session

JAMES R. WADDELL v. GREENELAWN MEMORY GARDENS, INC.

**Direct Appeal from the Circuit Court for Greene County
No. 07CV441KTL Hon. Kindall T. Lawson, Judge**

No. E2008-02522-COA-R3-CV - FILED SEPTEMBER 8, 2009

Plaintiff fell on defendant's property and sustained serious personal injuries. Defendant filed a Motion for Summary Judgment which the Trial Court sustained. On appeal, we hold that summary judgment was inappropriate as there were disputed issues of material fact. We vacate the summary judgment and remand with instructions for further proceedings.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Vacated.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Mark D. Edmonds, Jonesborough, Tennessee, for appellant, James R. Waddell.

S. Morris Hadden and Senitria A. Goodman, Kingsport, Tennessee, for appellee, Greenelawn Memory Gardens, Inc.

OPINION

In this action the plaintiff sued Greenelawn Memory Gardens, Inc., and alleged that he sustained serious personal injuries as a result of a latent dangerous condition on defendant's property. Plaintiff alleged that he was walking across defendant's property, and stepped on what he thought was a solid pile of rocks/cinderblock/debris, but there was a large hole there, which was obscured and caused him to violently fall. Plaintiff claimed that it was foreseeable to defendant that someone would fall and be injured by stepping in this hole, as people commonly walked on the property.

Defendant answered, and stated that it did have an unimproved lot, but that a sidewalk

was available, and that any defects were open and obvious, and denied that there were any latent dangerous conditions. Further, that plaintiff was solely at fault for his injuries.

Defendant then filed a Motion for Summary Judgment, asserting that it was entitled to judgment as a matter of law, because plaintiff admitted in his deposition that he knew the lot was dangerous, yet chose to walk there anyway. Defendant attached excerpts from plaintiff's deposition, wherein he testified that he had conversations with other people about the fact that there was debris laying around on the lot in question, and that "somebody's going to fall out here one of these days and somebody's going to get the hell sued out of them for not cleaning this mess up." Greenelawn also submitted the testimony of Debra Chapell, who related that plaintiff told her on the day of his accident that she should be careful walking around there because it was unsafe.

Greenelawn filed a Rule 56.03 Statement of Undisputed Facts, and plaintiff then responded with an Affidavit, stating that on the day in question, he had to walk onto the empty lot to retrieve his motorcycle that had been repaired at a nearby repair shop and it was then parked on the lot.¹ He stated that he had to walk across the lot to retrieve his motorcycle and that he was aware of the debris on the lot and took precaution to avoid falling, but that the hole where he fell was hidden by overgrown weeds and he could not see it. Plaintiff filed a response to defendant's Rule 56.03 Statement, and disputed several of the facts set forth.

The Court entered an Order Granting Summary Judgment, and in its opinion found that one factor to be considered was foreseeability, and that plaintiff clearly foresaw the danger because he said he knew the lot to be dangerous, and that he advised others of its dangerous condition. The Court found that this weighed in favor of summary judgment. The Court also discussed gravity of harm, and stated that while it wasn't "high on the scale", there was some likelihood that people could be harmed, but plaintiff clearly "knew that and saw that." Plaintiff has appealed, and the issue raised is whether the Trial Court erred in granting summary judgment to defendant, in light of the numerous genuine issues of material fact raised by plaintiff.

Plaintiff argues that there were genuine issues of material fact that would preclude summary judgment in this case, specifically, that plaintiff did not simply ignore the sidewalk provided for the repair shop and choose to walk on the vacant lot, but rather, he had to traverse the lot because the repair shop had parked his motorcycle some thirty feet into the interior of the lot, which was an ongoing practice, of which defendant was aware. Plaintiff argues that, even if the lot presented open and obvious danger of which he was aware, this does not insulate defendant from liability, instead, the duty issue must be analyzed considering foreseeability and gravity of harm, and the availability of alternative conduct that could have prevented the harm.

¹Defendant did not present any proof to dispute plaintiff's status as invitee, and plaintiff alleged in his original Complaint that his motorcycle was parked on the lot in question by the adjacent motorcycle repair shop and that the practice of parking motorcycles on the lot was "well known to and approved by" defendant, and that the practice of parking motorcycles on the lot was a regular occurrence for a number of years.

Thus, while plaintiff admits that the lot presented some open and obvious danger, and that he was generally aware of the same, he insists that summary judgment was inappropriate because defendant still owed him a duty that was breached and that there were latent defects (i.e. the hole obscured by overgrown weeds) that he was not aware of. He testified that what actually caused him to fall was that he stepped in a hole that he did not see though he was trying to be careful. Further, that there was no better route for him to take to retrieve his motorcycle, and that the conditions of the lot had existed for 4 or 5 years.

Essentially, the Trial Court found summary judgment was appropriate, primarily because the danger was foreseeable to the plaintiff. The Court analyzed the issue based simply upon the open and obvious danger of the debris on the lot and the fact that plaintiff was aware that the debris created a dangerous condition, but the Court did not address plaintiff's claim that there were latent defects on the property.

As this Court has previously said:

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. This court's role in reviewing the grant of summary judgment is to review the record and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met.

The requirements for the grant of summary judgment are that the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Consequently, summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion - that the party seeking the summary judgment is entitled to a judgment as a matter of law.

A court must determine first whether factual disputes exist and, if so, whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. A court must review the evidence presented at the summary judgment stage in the light most favorable to the nonmoving party, afford all reasonable inferences to that party, and discard all countervailing evidence.

Ayrhart v. Scruggs, 2004 WL 2113064 (Tenn. Ct. App. Sept. 21, 2004)(citations omitted).

In this case, the undisputed facts establish the lot was in a dangerous condition, and had been for several years. Thus, the inference must be drawn that the defendant was aware of the dangerous condition of the lot, as well as the plaintiff. Further, the undisputed facts establish that the lot contained both open and obvious danger, as well as latent defects that could not be easily seen.

The *Ayrhart* Court further explained that while the old rule was that if a dangerous condition was open and obvious, there was no duty on the part of the defendant and recovery was barred, but that rule has been modified in recent years such that a defendant can be held liable if the defendant can anticipate the harm under certain conditions. *Id.* Thus, the applicable rule is that if the “foreseeability and gravity of harm posed from a defendant’s conduct, even if ‘open and obvious,’ outweighed the burden on the defendant to engage in alternative conduct to avoid the harm, there is a duty to act with reasonable care.” *Id.* P.S. (Citing *Coln*, 966 S.W.2d at 431).

In the Trial Court’s analysis, the issue with regard to foreseeability and gravity of harm focused on foreseeability to plaintiff, rather than defendant. The Court should have analyzed whether the foreseeability to defendant of the plaintiff’s accident, coupled with the gravity of harm, outweighed the burden on the defendant to try and avoid the harm. The Trial Court found that the gravity of harm was not “high on the scale” but that there was clearly the potential for someone to fall and be injured. The Court failed to consider, however, the foreseeability of plaintiff’s accident to defendant.

As our Supreme Court has explained:

In short, foreseeability is the gravamen of negligence. If the injury that occurred could not have been reasonably foreseen, the duty of care does not arise, and even though the act of the defendant in fact caused the injury, there is no negligence and no liability. The plaintiff must show that the injury was a reasonably foreseeable probability, not just a remote possibility, and that some action within the [defendant’s] power more probably than not would have prevented the injury.

Doe v. Linder Constr. Co., 845 S.W.2d 173, 178 (Tenn.1992) (citations omitted).

In this case, the plaintiff demonstrated that the injury was foreseeable to defendant because the plaintiff showed that there was danger from latent defects and that the condition had existed for a number of years, and had not been rectified despite the fact that it was common practice for the repair shop to utilize the lot to park motorcycles that had been repaired. The Court did not consider whether the injury was foreseeable to defendant, however, but rather focused on plaintiff’s foreseeability and thus barred the plaintiff from recovery.

A duty of a premises owner includes the responsibility to remove or warn against latent or hidden dangerous conditions on the premises on which the owner was aware or should have been aware through exercise of reasonable diligence. *Rice v. Sabir*, 979 S.W.2d 305 (Tenn. 1998); *Eaton v. McLain*, 891 S.W.2d 587, 593-94 (Tenn. 1994).

Defendant argues this case is factually analogous to *Jones v. Wayne County Medical Center*, 2007 WL 2097911, (Tenn. Ct. App. July 10, 2007), a case in which summary judgment was granted to defendant in an action brought by a tenant’s employee who fell on a wooden staircase that

led to her office. In that case, the Court did discuss the fact that plaintiff testified she thought the stairway was dangerous, but used the same anyway, and concluded plaintiff had superior knowledge of the condition of the staircase. The Court also relied on the fact that there was alternate means of ingress and egress to the office that plaintiff could easily have utilized, which she felt was safe. In this case, it was not shown that plaintiff had superior knowledge of the condition of the lot, nor that there was an alternative route that was less dangerous. *Jones* is distinguishable on these grounds. Moreover, it is undisputed that plaintiff could not retrieve his motorcycle without traversing defendant's property in the manner in which he did.

We conclude the Trial Court failed to consider the undisputed fact there were latent defects on the lot in the form of holes obscured by old growth and weeds, in addition to the open and obvious dangers posed by the debris. Our case law makes clear "in cases involving premises liability, the premises owner has a duty to exercise reasonable care under the circumstances to prevent injury to persons lawfully on the premises". *Eaton, Id.* The Trial Court in this case failed to take into account the duty on the part of the defendant to remove or warn against a latent dangerous condition. We conclude summary judgment was inappropriate for all the reasons set forth.

The Judgment of the Trial Court is vacated and the cause remanded for further proceedings in accordance with this Opinion. The cost of the cause is assessed to Greenelawn Memory Gardens, Inc.

HERSCHEL PICKENS FRANKS, P.J.